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No. 94-421

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

M. ASHLEY DICKERSON, a/k/a MAHALA ASHLEY DICKERSON, WILLIAM F. BOCAST, WILLIAM ANDREW and MARY ANDREW,
Petitioners,

v.

DUKE WILLIAMS, JEAN WILLIAMS, and MATANUSKA-SUSITNA BOROUGH,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. Was failure to give notice of the August 15th, 1991 meeting a denial of Due Process and equal protection?

II. Did the condonation of destruction of a previously-approved road and the requirement that buyers recreate same in a swamp amount to the taking of property without due process of law?

III. Was the withholding of notice of the August 15th meeting, notice of the new construction an excuse for failure of timely appeal and a denial of due process and equal protection?

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ARGUMENT

I. RESPONSE TO STATEMENT OF THE CASE

The statement of the case erroneously infers that a parcel was sold to Duke and Jean Williams immediately after the sub-dividing in 1976. In fact, the 40 acres was sold to the Browners, Cards, and Dickerson in 1981 as shown by their deed in the petition heretofore filed as Appendix P 1-4. The sale to Duke and Jean Williams did not take place until 1986 as shown by their Assumption Warranty Deed at Appendix Q 1-4 of Opening Petition. The Respondent correctly alludes to the creation of the easement as shown by Petitioner's at their Appendix I 1-2. Gross error is committed by the statement in Respondent's Brief that "Jeep trails were constructed within the roadway easement to provide vehicular access across the Andrew's property to the adjoining parcels. This is a gross mis-statement and this mis-statement has permeated the case. This falsity is depicted in Respondent's Exhibits at its Appendix J P 25. The only Jeep trails were those constructed within the 40 acres

and accessed by the Borough-approved road within the easement which the Williamses destroyed by ditching piling of debris and landscaping.

In his affidavit, Will Bocast states: "Unfortunately, the photographs are of Jeep trails which circle the 40 acres, not of the easement road ..." Bocast further states: "...the easement was rendered impassible after the advent of the Williamses and the creation of berm piles preventing travel by us in the late '80's..." PET APP A 1-2.

Respondents have, in their Appendix, reproduced color photos of Jeep trails in the 40 acres misrepresenting them as trails used to access the 40 acres. Strother, the Borough Official making the Affidavit years later, was obviously confused. The report to which he refers is included in Petitioner's Appendix at pages G 1-4. There he admits that the Williamses had "landscaped the western 150 feet of the south 100 feet of the public use easement." He added that "it does not seem to be in use by anyone and could easily be vacated without harming any access to anyone at this time, as the

Williams's currently have a lawn and have landscaped this area."

Bocast further stated in his Affidavit, "it does not take long for foliage to recreate itself in Alaska, so it is not surprising that the Jeep trails within the 40 acres grew up so rapidly after the Jeep trails were blocked and the easement closed ... the Williamses have ditched and piled berm and rubbish in our private easement in a manner which blocked our use of it...."

The Statement of Facts at page 3 of Respondent's Brief contends that on August 23rd, 1991, the Williamses built a new gravel road within the north 100-foot portion of the easement, relying on the Affidavit of George Strother, the same Borough official who condoned the landscaping of the pre-existing road destroyed by the Williamses.

Despite the fact that the requirement of the "Resolution of June 20, 1991" that the road be to the same standard of the part of Trails End to the west, which was to Pioneer Access Standards, and this requirement was reduced in the secret meeting of August 15th, 1991 to a Jeep

trail, having no standard at all, as shown by the minutes of the August 15th, 1991 meeting, PET APP H 8-9. Respondent erroneously contends that there was compliance with the June 20th, 1991 Resolution.

A vested right was given to Bocast, the Browners, the Cards, and Dickerson upon their purchase of their property, as the Planning Commission had already approved the road which the Williamses destroyed. The "Waiver Resolution," serial number 76-39 shown in Petitioner's Appendix R 1-4 gave that right. Why then would the purchasers be required, ten years later, to redo what the Borough had approved upon their original sales of their respective tracts described as numbers one, two, three, and four, respectively therein?

The only legal requirement of the purchasers of parcel four should have been the construction of roads through their 40-acre tract to provide access to their respective ten and 20-acre parcels.

The position taken by the Borough that this new requirement should be placed upon the 40-acre parcel purchasers amounts to taking from them a property right.

William and Mary Andrew could not have sold to them without having met the Borough's standard of a road to said properties. The destruction of that right by Williamses, the later purchasers of the intervening 10 acres, justified the requirement of a replacement road up to Pioneer Access standards. The approval of the road destroyed by the Williamses had stood unchallenged on high land for over 15 years, although blocked by the Williamses for five years. There was a vested right in the validation of the existing plat status according to Matanuska-Susitna Borough Platting Regulation 16.25.015 which provides that "... all plats recorded in pursuance of any law heretofore in force prior to the effective date of this title and not subsequently vacated are hereby validated, notwithstanding irregularities, and given the same legal status of those recorded under the provisions of this title."

There was no opportunity for the Borough Assembly to veto the action of the Planning Board, as a secret meeting of August 15th, 1991 and the construction of the Jeep trail were completed at a time

when the Borough Assembly was not in session.

There was no need for the petitioner's to appeal the action of June 20th, 1991, as that action was favorable to them, requiring the Williamses to restore what had been taken away by them. The false claim that the Jeep trails inside the 40 acres were all that existed would cast aspersions upon the Platting Board and the Borough, as both would have been guilty of violating their own requirements if they approved a subdivision waiver without following those requirements. No requirement of road construction was placed upon the purchasers or could be placed upon them until such time as they started to partition the 40 acres. The Waiver Resolution gave a stamp of approval on the 17th of September, 1976 of all conditions required to permit subdividing. The Borough would later require those purchasers to repurchase what they had already paid for.

The Jeep trail, as approved by the Borough, is built in wetlands as shown by the Affidavit of a professional road builder, Jake Marquez. There was nowhere

for the Jeep trail to drain, as the swamp land was all the same elevation. The Williamses had dug a ditch from the highland to facilitate drainage from their property onto the Jeep trail (PET APP C 1-3). Pioneer Access Roads are covered in the Matanuska-Susitna Borough Construction Manual at Section 009. This section provides as follows:

> "...This road, whether it is proposed or existing, shall have a minimum surface of 18 feet and a 12-inch gravel subgrade, and a gravel surface that is stable if crossing swampy areas and has adequate surface drainage. Cross drainage culverts, minimum 24-inch, will be installed where determined necessary and adequate ditches provided for drainage where necessary..."

The Affidavit of Marquez shows that ditching is impossible in this area as all terrain is of the same level.

A. RESPONSE TO CONTENTION OF THE FEDERAL DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT ISSUE

An untrue statement that Petitioners

claim insufficient notice of the June 20th, 1991 meeting is given. That meeting ended in a requirement of a construction of a Mat-Su Borough-approved road, equivalent of that to the west. There was no need to appeal therefrom. The quarrel of the Petitioners was with the secret, August 15th, 1991 meeting of the Williamses and the Platting Board where the modification was made to require only a Jeep trail. Despite the contention that no modification resulted, the following transpired:

> Having met with Mrs. Williams yesterday and Strother having met with her on a previous meeting, and her having notice of this meeting and again meeting without the presence of the others indicates a conspiracy.
>
> It was admitted that the motion was that the road should be built to the standard "at which the standard is at the west end of the north one hundred feet." They admitted some confusion since that was a

pioneer access road. They wanted to change it and did change it. A platting board member continued that "...it was not a heavily travelled road, a Jeep trail should suffice, I don't see why they'd have to build a full road."

Yet no one could prove what kind of road they had before since the Williamses had destroyed it. Brown continued with "...equally constructed to what the Jeep trail was." This is totally different from equal to that of the west. They do not realize however, that even a Jeep trail constructed in the swamp would be different from a Jeep trail constructed on high land. There was no admission of only a Jeep trail but all of the evidence presented was to the effect that it was a good, useable road. Mrs. Williams was allowed to speak and to set out that "she intended to give them a half-way decent road,"

> (Appendix H14) she had been checking out gravel prices, that the road she would give be fixed 15 times better than what they had before, but what none realized is that she destroyed what they had before. The board members proceeded to congratulate Mrs. Williams, saying she bent over backwards. She did not intend to have it a superior road like they had it stated before. "It will be much superior than what she had before. I just want you to understand that," she states, thus admitting that there was a definite change from a road to a Jeep trail.

Respondent contends on page eight (8) of its brief that the Jeep trails from inside the 40 acres were what had been the road. This is a false contention and casts aspersions on the Borough which would have approved a waiver with only a Jeep trail and no road. The roads had to have been destroyed and ditched by the Williamses, as shown by Affidavits of

Bocast (PET APP A 1-3) and Connelly (PET APP D 1-3). There is no way to use a non-existing road as claimed by Respondents for a comparison, as it was completely destroyed by the Williamses. By condoning this destruction and not requiring its reconstruction, the Platting Board has worked with the Williamses to block access to the 40 acres. Adickes v. Kress & Co., 398 U.S. 144; Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987).

Under division three of its argument, the Borough pounces upon the black aspect of denial of the equal protection clause of the 14th Amendment as if blacks are not generally as entitled to the equal protection found in the equal protection clause of the 14th Amendment as any other citizen. Equal protection as provided by the 14th Amendment has also been denied Bocast, who is not black.

B. SUBSTANTIAL CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED

The Borough's action here is built upon the false premise that Jeep trails inside the 40 acres were the only means of access. The destruction of the Planning Board's approved road is being ignored.

The Jeep trails inside the 40 acres are all that remain to be seen, since the Williamses had destroyed, by landscaping, or ditching, the true previously-approved, Borough road. The taking of property without due process resulted, creating a substantial constitutional question regarding denial of the due process clause of the 14th Amendment. Can the destruction of access to property, by destroying a previously-approved road, and the requirement that the purchasers who suffered the destruction recreate the road in a swamp amount to the taking of property without due process, according to the due process clause of the 14th Amendment?

C. APPELLATE REMEDIES WERE MADE IMPOSSIBLE

There was no reason to appeal the June 20th, 1991 decision, as it would have restored what had been destroyed. The secret meeting and the secret construction of the Jeep trail at a time the Borough Assembly was not in session, made it impossible to meet a 30-day deadline. An examination of Platting Board Resolution, serial number 91-5-V, dated September 9,

1991, recorded in Book 0661, page 768, reveals therein the following:

> WHEREAS, the Platting Board approved the vacation request subject to the approval of the Matanuska-Susitna Borough Assembly within 30 days of the Platting Board action and providing alternate, uninterrupted, equally constructed access through the subject property within the 100' remainder easement prior to recordation of the vacation resolution; and
>
> WHEREAS, as the Matanuska-Susitna Borough Assembly did not hold any regularly scheduled meetings within the 30-day time frame, the vacation request as approved by the Platting Board was automatically approved pursuant to AS 29.40.140(b) and ...

It is obvious from the above that there was no opportunity to appeal from the final action of the Platting Board as no notice was given of the changes or the construction of the Jeep trail in the

swamp.

The whole concept is twisted by the false contention that the overgrown Jeep trails inside the 40 acres were the means of travel to and from the 40 acres instead of the actual Planning Board-approved road which the Williamses had landscaped, ditched, and destroyed. Nothing was left with which to compare, due to the work of the Williamses.

CONCLUSION

The Borough castigates the Petitioners for objecting to the requirement imposed on the Purchasers of the 40 acres of completely redoing what had been approved 15 years earlier. Having purchased certain properties already subdivided with Borough approval, then after destruction of the approved road by the Williamses, allowing them to substitute a swamp Jeep trail for the approved road, then requiring the impossible, specifically bringing a swamp Jeep trail to Pioneer Access standards amounts to taking a property in denial of the due process clause of the 14th Amendment. The 40 acres have been literally condemned by the Platting Board of the Matanuska-Susitna Borough.

DATED AT Wasilla, Alaska this 11th of October, 1994.

DICKERSON & GIBBONS, INC.

BY M. Ashley Dickerson

M. Ashley Dickerson